

10-13-2016

State v. Green Respondent's Brief Dckt. 44032

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Green Respondent's Brief Dckt. 44032" (2016). *Not Reported*. 3209.
https://digitalcommons.law.uidaho.edu/not_reported/3209

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44032
Plaintiff-Respondent,)	
)	Twin Falls County Case No.
v.)	CR-2014-12303
)	
CHRISTOPHER LEE GREEN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Green failed to establish that the district court abused its discretion, either by revoking his probation, or by denying his Rule 35 motion for a reduction of his unified sentence of five years, with two years fixed, imposed following his guilty plea to possession of methamphetamine?

Green Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Green pled guilty to possession of methamphetamine and the district court imposed a unified sentence of five years, with two years fixed, but suspended the sentence, and placed Green on supervised probation for two years. (R., pp.190-97.)

Three months later, the state filed a motion to revoke probation, alleging Green had violated the conditions of his probation by failing to report for supervision, possessing alcohol, admitting to using methamphetamine and marijuana, testing positive for methamphetamine and marijuana, associating with individuals involved in criminal activity, failing to submit to four UA's per month, failing to sign up for MRT, and being discharged from Intensive Outpatient programming. (R., pp.208-33, 265-69.) Green admitted to all but one of the allegations and the district court revoked his probation and ordered the underlying sentence executed. (R., pp.265-69, 271, 315-19.) Green filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.320-21, 328-31.) Green filed a notice of appeal timely from the district court's order revoking probation. (R., pp.332-34.)

Green asserts that the district court abused its discretion by revoking his probation in light of his significant progress while on probation, mental and physical health issues, and his detailed action plan. (Appellant's brief, pp.4-8.) Green has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider "whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society." Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Green is not an appropriate candidate for probation. He has a lengthy criminal history that includes convictions for theft, possession of drug paraphernalia, possession of a concealed weapon, lewd conduct with a child under 16, felony injury to child (two convictions, one of which was amended from lewd conduct), trespassing, and multiple driving-related offenses. (PSI, pp.4-9.) Green also has a history of failing to comply with court orders and the terms of community supervision. (PSI, pp.9-10.) He was placed on probation in 2003 and repeatedly violated by continuing to use methamphetamine, committing a new crime of lewd conduct with a minor under 16, failing to attend drug and alcohol treatment, violating curfew, failing to report as directed, and leaving Wendell without permission. (PSI, p.10.)

Green did not make significant progress while on probation in this case; after judgment was entered on May 29, 2015, he failed to report to orientation on June 1, 2015, or any of the next four meetings, had alcohol at his house twice in June, admitted to smoking methamphetamine and marijuana multiple times between June and July, was discharged from Intensive Outpatient programming on July 30, 2015, for failing to attend, and was associating with individuals involved in criminal activity. (R., p.265-69.)

At the disposition hearing for Green's probation violation, the district court said, "And I told you, don't come back here, because if you do, I will put you in the pen. And you're back. It's the same problems over and over and over again." (1/12/16 Tr., p.13, Ls.17-19.) The district court's decision to make good on its previous admonition was appropriate, and the revocation of probation was necessary to achieve the goals of protection of society and rehabilitation. Probation was clearly not serving the purpose of rehabilitation in this case, as evinced by Green's ongoing substance abuse and the fact

that he was not making any progress in treatment. Neither was probation achieving the goal of community protection, given Green's continued criminal conduct and refusal to comply with the terms of community supervision.

The district court considered all of the relevant information and concluded, "I think further time in incarceration in the penitentiary setting is appropriate, Mr. Green. I do not believe that you will make probation." (1/12/16 Tr., p.13, Ls.21-23.) Green's continued criminal behavior, his refusal to comply with the conditions of community supervision, and his failure to make any rehabilitative progress while in the community did not merit continued probation. Given any reasonable view of the facts, Green has failed to establish that the district court abused its discretion by revoking his probation.

Green next asserts the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence. (Appellant's brief, pp.6-7.) In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion "does not function as an appeal of a sentence." The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Green did not appeal the judgment of conviction in this case. In support of his Rule 35 motion, Green filed an affidavit explaining that, before his arrest on his

probation violations, the department of Health and Welfare approved a 22-month case plan for Green to regain custody of his daughter, and being incarcerated for two years would mean she would be placed for permanent adoption. (R., pp.324-27.) The district court indicated it was aware when at the time it revoked Green's probation and ordered his sentence executed without reduction that Green "hoped to reunite with his daughter under a child protection case plan," although the specifics of that plan were not discussed at the revocation hearing. (R., pp.328-31.) The district court acknowledged the specifics of the plan, as represented by Green in his affidavit, but was not persuaded to modify the sentence, stating, "The defendant knew the underlying sentence he faced--and the consequences of violating probation--when he signed the Plea Agreement." (R., p.330.) Green failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm the district court's orders revoking probation and denying Green's Rule 35 motion for a reduction of sentence.

DATED this 13th day of October, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of October, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General